BEFORE THE WASHINGTON
UTILITIES AND TRANSPORTATION COMMISSION

In the Matter of the Penalty Assessment Against THE CENTURYLINK COMPANIES – QWEST CORPORATION; CENTURYTEL OF WASHINGTON; CENTURYTEL OF INTERISLAND; CENTURYTEL OF COWICHE; AND UNITED TELEPHONE COMPANY OF THE NORTHWEST In the amount of $226,600	DOCKET UT-220397 STAFF'S ANSWER TO THE CENTURYLINK COMPANIES' PETITION FOR REVIEW

I. INTRODUCTION

1 The CenturyLink companies – Qwest Corporation, CenturyTel of Washington, CenturyTel of Inter Island, CenturyTel of Cowiche, and United Telephone Company of the Northwest – operate under an alternative form of regulation (AFOR) that requires those companies (collectively "Lumen") to "provide notice to the Commission of any changes to its flat-rated stand-alone residential rates at the same time CenturyLink provides notice to its customers of the rate change." Lumen failed to comply with that term, with the companies named in this penalty assessment each changing their flat-rated stand-alone residential rates long before notifying the Commission of the changes. Lumen here petitions for review of the denial of its application for mitigation of the penalty imposed for violations of the AFOR's notice provisions.

2 The Commission should deny Lumen's petition and affirm the Executive Director's decision not to mitigate the penalty. A simple hypothetical shows why: if the Commission were to lay the collective 2,266 days of Lumen's failure to provide notice sequentially on a timeline, with Halloween 2022 as its origin, Lumen would not provide

notice to the Commission until sometime in the year 2029. The full penalty is necessary to disincent that level of non-compliance.

II. BACKGROUND

3 In 2014, the Commission entered an order (Order 04) approving several settlements, thus authorizing Lumen to operate under an AFOR.[1] One term of those settlements requires Lumen to "provide notice to the Commission of any changes to its flat-rated stand-alone residential rates at the same time CenturyLink provides notice to its customers of the rate change."[2]

4 The Lumen companies named in the relevant penalty assessment all increased their flat-rated stand-alone residential rates in 2021 and 2022 without providing timely notice to the Commission.[3] Qwest Corporation raised the relevant rate on January 1, 2021, and again on January 7, 2022, yet it did not provide notice of either change until March 1, 2022.[4] CenturyTel of Washington, CenturyTel of Inter Island, CenturyTel of Cowiche, and United Telephone Company of the Northwest all raised the relevant rates on January 22, 2021, and again on January 14, 2022, yet none provided notice to the Commission until March 1, 2022.[5] Collectively, Lumen failed to provide notice of changes to its flat-rated stand-alone residential rates for 2,266 days.

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[1] *See generally in re Petition of the CenturyLink Companies*, Docket UT-130477, Order 04 (Jan. 9, 2014).
[2] *Id.* at 9 ¶ 26, Appx. A at Attachment A at 4.
[3] *In re Penalty Assessment Against the CenturyLink Companies*, Docket UT-220397, Notice of Penalties Incurred and Due for Violations of Commission Order, at 4 (June 1, 2022) (listing the notice failures); *In re Penalty Assessment Against the CenturyLink Companies*, Docket UT-220397, Application for Mitigation of Penalty, 2 ¶¶ 3-4 (June 8, 2022) (admitting that Lumen committed the violations).
[4] *In re Penalty Assessment Against the CenturyLink Companies*, Docket UT-220397, Notice of Penalties Incurred and Due for Violations of Commission Order, at 4.
[5] *In re Penalty Assessment Against the CenturyLink Companies*, Docket UT-220397, Notice of Penalties Incurred and Due for Violations of Commission Order, at 4.

5 The Commission issued to Lumen a penalty assessment in the amount of 226,600, reflecting a penalty of $100 per operating company per day that Lumen failed to provide notice.[6] Lumen applied for mitigation of that penalty, and the Commission's Executive Director denied the petition.[7] Lumen now petitions for review of the denial of its application for mitigation.[8]

III. ARGUMENT

6 Lumen requests mitigation of the penalty imposed for its violation of the notice provision of the AFOR Order, contending that the Commission should mitigate the penalty because: (1) it did not knowingly commit the violations; (2) it gained nothing from the violations, which it claims harmed no customer; (3) the Commission improperly counted the number of violations when issuing the penalty assessment by treating the violations as continuing violations and by penalizing each individual Lumen operating company; and (4) in comparable circumstances, the Commission has mitigated penalties. Those arguments lack merit, and the Commission should decline to mitigate the penalty based on them.

A. Personnel Losses During the COVID-19 Pandemic do not Mitigate Lumen's Non-Compliance

7 Lumen first contends that personnel losses during the COVID-19 pandemic mitigate its violations to some extent.[9] Specifically, Lumen contends that, because of those losses, it did not knowingly commit any violations.[10] Two alternate lines of analysis

[6] *In re Penalty Assessment Against the CenturyLink Companies*, Docket UT-220397, Notice of Penalties Incurred and Due for Violations of Commission Order, at 3.
[7] *See generally in re Penalty Assessment Against the CenturyLink Companies*, Docket UT-220397, Application for Mitigation of Penalty; *see also* WAC 480-07-903(2)(e)(i).
[8] *See generally In re Penalty Assessment Against the CenturyLink Companies*, Docket UT-220397, Petition for Commission Review of Delegated Decision (Oct. 10, 2022) (hereinafter Petition).
[9] Petition at 2-4 ¶¶ 4-6, 5 ¶ 9.
[10] Petition at 2-3 ¶ 4, 5 ¶ 9.

should cause the Commission to deny mitigation on this basis: (1) Lumen is charged with actual or constructive knowledge of Order 04's requirements, and thus any ignorance of the law does not excuse its failure to comply with those requirements, and (2) even if the Commission accepts that Lumen did not know the relevant law, and that ignorance justified mitigation, that ignorance means that Lumen's compliance program is not functioning, which justifies a harsher penalty in its own right.

8 Initially, the Commission should view Lumen as having actual or constructive knowledge of Order 04's requirements. People (including corporations) presumptively "know the law."[11] This presumption applies strongly to "to those who ought to know the law," including those working in technical fields, such as, for example, those employed at a telecommunications company.[12] Lumen operates in a regulated environment, and the Commission should presume that it knows the requirements of Order 04, the legal document that creates the regulatory structure under which it operates in Washington. Turnover should not suffice to nullify the presumption, especially given that some of these violations stretched out over lengthy periods of time, meaning that new employees to the compliance program had sufficient time to read and internalize the requirements of Order 04.

9 This actual or constructive knowledge on Lumen's part prevents mitigation here. As Washington's courts recognize, it is a "universal maxim that ignorance of the law excuses no one."[13] Lumen seeks exactly what the law universally condemns – mitigation

[11] *Hutson v. Wenatchee Fed. Savings & Loan Ass'n*, 22 Wn. App. 91, 98, 588 P.2d 1192 (1978).
[12] *Hutson*, 22 Wn. App. at 98 (citing as an example, "a state banking supervisor, who should be presumed to know banking law.").
[13] *Leschner v. Dep't of Labor & Indus.*, 27 Wn.2d 911, 926, 185 P.2d 113 (1947); *see also In re Disciplinary Proceedings Against Droker*, 59 Wn.2d 707, 370 P.2d 242 (1962) ("[i]f a layman cannot be heard to say that he is ignorant of the law, how much less may an attorney be permitted to offer such an excuse in mitigation of his offense.").

based on a claim that it did not know the requirements of the law. The Commission should reject that request.

10 Finally, even if the Commission concludes that Lumen did not knowingly violate the law, and that this ignorance somehow provided Lumen with some excuse, that fact does not justify mitigation. While the Commission considers whether a company knowingly commits violations when considering the appropriate penalty, it also considers whether the company has a functional compliance program.[14] If Lumen did not know about the requirements of Order 04, any mitigation warranted by the violations being unknowing is canceled out by the fact that Lumen's regulatory compliance program does not know or understand its obligations under the document that governs its Washington operations.

B. Lumen's Violations Were Harmful in That They Deprived Customers of Commission-Offered Protections

11 Lumen next contends that the Commission should mitigate the penalty because: (1) it gained nothing from the violations, and (2) the violations harmed no customer.[15] Those arguments are flatly incorrect.

12 The Commission intended the AFOR authorized by Order 04 to balance the needs of Lumen and its customers. By freeing Lumen from traditional rate-base/rate-of-return ratemaking, the Commission gave Lumen the flexibility to compete in the marketplace. At the same time, the AFOR contained various provisions intended to "provide appropriate oversight and consumer protection," and the notice provision that Lumen

[14] *In re Enforcement Policy of the Wash. Utils. & Transp. Comm'n*, Docket A-120061, Enforcement Policy of the Wash. Utils. & Transp. Comm'n, at 4, 9 (Jan. 4, 2013).
[15] Petition at 3-4 ¶ 6, 5 ¶ 8.

violated was one of these.[16] In that light, Lumen's violations do injure customers – they deprive customers of the Commission's oversight of Lumen's conduct. And they similarly provide a benefit to Lumen – they prevent the Commission from exercising its powers of oversight.

13 Lumen contends that deprivation of this oversight cannot constitute an injury to customers or a benefit to itself because the Commission had never before intervened in one of Lumen's rate changes under the AFOR. That the Commission has never intervened does not mean that it could not have done so here if it had received notice, either by terminating the AFOR,[17] or, as regards the second set of rate changes, which occurred in the midst of the COVID-19 pandemic, by consulting with the governor's office about suspending the AFOR waivers pursuant to the state of emergency declared due to the pandemic.[18] But the Commission did not have the chance to do so because Lumen deprived it of the notice necessary to choose whether to exercise those powers. The Commission should penalize the company to disincent it from depriving the Commission of agency in the future.

C. The Commission Properly Counted the Number of Violations

14 Lumen next argues that the Commission should mitigate the penalty because it improperly: (1) considered the violations continuing violations, and (2) calculated the number of violations by treating each operating company as a separate entity.[19] The Commission should reject both arguments because Lumen bases: (1) the first on a

[16] *In re Petition of the CenturyLink Companies*, Docket UT-130477, Testimony in Support of Settlement Agreement, at 7-8 (Sept. 19, 2013).
[17] *See* RCW 80.36.320(3), .330(7).
[18] *See* RCW 80.36.320(5), .330(9).
[19] Petition at 4 ¶ 7, 6 ¶ 10.

misunderstanding of the notice requirement, and (2) the second on a misunderstanding of the corporate form.

15 In this set of arguments, Lumen first contends that the Commission should refrain from treating the violations as continuing violations, stating that its obligation to notify Staff "was a singular event for each notice" and that it "did not have an obligation to file the notice the day after or the day after that."[20] The Commission should reject that argument, for two reasons.

16 Lumen misconstrues the notice requirement. The parties did not negotiate that term into the AFOR settlements, and the Commission did not approve it, so that the Commission would have a piece of paper or an email on file on a certain date. The parties instead negotiated that term, and the Commission approved the settlements containing it, so that the Commission could provide appropriate oversight of Lumen's operations and ensure the protection of consumers.[21] Every day that Lumen failed to provide the notice to the Commission was a violation of that substantive notice requirement. The Commission should therefore treat the violations as continuing for each of those days and impose a penalty accordingly.[22]

17 Indeed, it has to be that way: accepting Lumen's argument produces absurd consequences. Under its interpretation, a utility engaging in business with unsafe facilities commits only a single violation if it continues to operate with those hazardous facilities after the Commission orders it to come into compliance by a certain date. That

[20] Petition at 5 ¶ 7.
[21] *In re Petition of the CenturyLink Companies*, Docket UT-130477, Testimony in Support of Settlement Agreement, at 7-8.
[22] *See* RCW 80.04.405.

cannot be the law, as the utility would be able to simply shrug off the disincentive provided by the penalty, with attendant risks to public health, safety, and welfare.

18 Lumen also contends that the Commission improperly counted violations by separately citing each operating company rather than citing Lumen as a single entity. But the company structured its operations with each operating company as a separate legal entity.[23] The penalty assessment simply reflects that reality.

19 Lumen nevertheless argues that, if each operating company is cited separately, the overall penalty is disproportionate to the size of each operating company.[24] But Lumen uses the wrong comparison. If each operating company is treated separately, the penalty imposed on each operating company, not the sum total of all the penalties imposed on all operating companies, is the proper measure for whether the penalty is disproportionate, and Lumen offers no argument that those numbers show disproportionality.

D. The Commission Matters Cited by Lumen are not Comparable and Thus do not Justify Mitigation

20 Lumen finally argues that two Commission orders compel mitigation of the penalty imposed here.[25] They do not.

21 Lumen first cites the ALJ's order in Docket TG-091127, a complaint proceeding against Waste Management. There are three problems with this argument. First, as Lumen acknowledges, that order is non-precedential.[26] Second the ALJ entered that order before the Commission issued its policy statement on enforcement, which has guided it and staff's consideration of an appropriate penalty ever since, and thus the order is to

[23] *R.N. v. Kiwanis Int'l*, 19 Wn. App. 2d 389, 496 P.3d 748 (2021) ("[a] corporation is a distinct legal entity, existing artificially in law, and maintaining its own legal obligations and interests.").
[24] Petition at 7 ¶ 13.
[25] Petition at 7-8 ¶¶ 15-16 & n.3.
[26] Petition at 8 ¶ 15.

some extent legally incomparable to the present matter.[27] Finally, the facts here distinguish this matter from the Waste Management case. The violations at issue in the Waste Management case were "isolated" and short lived, and the company instituted "extensive" measures to prevent recurrence.[28] Here, Lumen's violations were pervasive in that they affected all residential customers taking flat-rate stand-alone service, and they continued for a significant period of time (more than six years, collectively). And Lumen has not described any extensive controls that it has put into place to prevent a recurrence of these violations in the event of future turnover.

22 Lumen also cites the Executive Director's order in consolidated dockets UT-090440 and UT-090441, penalty proceedings against Cordia Communications Corporation and Northstar Telecom, Inc. Again, those cases are not comparable, legally or factually. Again, the Commission did not itself issue the order in those consolidated cases, and the Commission should treat the order as non-precedential. And, again, the Executive Director issued the order in those cases before the Commission issued its policy statement. And, perhaps most importantly, the order in the consolidated cases did not reflect mitigation so much as the Commission accepting Staff's recommendation for the appropriate penalty.[29] Here, Staff recommends that the Commission impose the maximum penalty, and it should do so.

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[27] *See generally in re Enforcement Policy of the Wash. Utils. & Transp. Comm'n*, Docket A-120061, Enforcement Policy of the Wash. Utils. & Transp. Comm'n.
[28] *Wash. Utils. & Transp. Comm'n v. Waste Mgmt. of WA, Inc.*, Docket TG-091127, Order 02, 14-15 ¶ 51 (Jan. 26, 2010).
[29] *In re Penalty Assessment Against Cordia Commc'ns Corp.*, Dockets UT-090440 & UT-090441, Order 02, 6-7 ¶ 19 (Jun 19, 2009).

IV. CONCLUSION

23 For the reasons stated above, Staff respectfully requests that the Commission affirm the Executive Director's decision not to mitigate the penalty imposed on Lumen for its violations of the notice provisions of the AFOR Order.

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Respectfully submitted,

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